This question was recently considered in *Re Sunflower State Refining Co.* (D. C., D. Kan. 1911) 183 Fed. 834. The case was governed by the law of Kansas, which adheres to the lien theory.[15] A corporation had executed a mortgage to trustees to secure bonds that might be issued in the future, and thereafter an attachment was levied on its property. Later, the bonds were issued to purchasers in good faith. The court adopted the doctrine that the recording of the attachment did not constitute notice to the purchasers of the bonds, and held that they should have a lien prior to that of the attaching creditor. The latter conclusion, although inconsistent with the lien theory of a mortgage, follows the principle usually adopted in cases where the mortgagee made his advances without notice.[16] It was strengthened, moreover, by the fact that as the case involved a corporate mortgage, the opposite result would be contrary to public policy, since the bonds would not be marketable unless the lien of the bondholders was allowed priority from the date of the mortgage.[17]

THE APPLICATION OF THE STATUTE OF FRAUDS TO PARTNERSHIP AGREEMENTS FOR SPECULATION IN LAND.—In its application to the law of partnership, that section of the Statute of Frauds which provides that no transfer or declaration of an interest in land, except such as are created by operation of law, shall be valid unless evidenced by writing, assumes perhaps its most important aspect in connection with attempts to establish a firm's interest in realty. It is practically undisputed that if the agreement to form the partnership is in writing, oral evidence may be introduced to show that land in fact belongs to the firm although the legal title is held by one of the partners.[1] In such a case a trust is implied either from the purchase of the land with funds belonging to the association[2] or from the fact that one partner has fraudulently taken title for his own benefit, when he should have acquired it for the firm.[3] Even though the contract of partnership is not in writing, yet if it can be construed to relate merely to the profits arising from the sale of real estate, oral evidence is permitted to show the share of each partner in such profits,[4] as the agreement is not treated as contemplating the acquisition of any interest in realty by the firm,[5] but the sale of the property is considered merely as a condition precedent to any right in the profits.[6] If on the other hand, one of the future partners promises to contribute land to the firm's

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[15]Pomeroy, Eq. Jur § 1188.

[16]See cases cited in notes 12 and 14.

[17]Central Trust Co. *v.* Continental Iron Works *supra;* see Reed's Appeal (1888) 122 Pa. St. 565; Tompkins *v.* Little Rock etc. Ry. *supra.*

[1]McKinnon *v.* McKinnon (1893) 56 Fed. 409; Fall River Whaling Co. *v.* Gordon (Mass. 1852) 10 Cush. 458.

[2]King *v.* Hamilton (1854) 16 Ill. 190; Cottle *et ux. v.* Harrold, Johnson Co. (1884) 78 Ga. 830; see Sherwood *v.* St. Paul, etc., R. R. (1875) 21 Minn. 127.

[3]Lacy *v.* Hall (1860) 37 Pa. St. 360; Jennings *v.* Rickard (1887) 10 Colo. 395.

[4]Coward *v.* Clanton (1889) 79 Cal. 23; Everhart's Appeal (1884) 106 Pa. St. 349; Davis *v.* Gerber (1888) 69 Mich. 246.

[5]See cases under previous note.

[6]Davis *v.* Gerber *supra.*

capital, it is well settled that this agreement, which does not of itself vest title in the firm,[7] is one for the future transfer of land and unless in writing is unenforceable.[8]

Where, however, the partnership is formed for the purpose of acquiring land which at the time is in the possession of third parties, the decisions are far from harmonious as to whether the agreement effects the transfer of any interest in realty and hence is within the Statute. It may be admitted that if it is competent to show by parol that a partnership exists and also what land belongs to the partnership, the ultimate result, at least in those jurisdictions where upon dissolution and accounting a partner can obtain a division of the realty itself,[9] is the acquisition of an interest in land. Accordingly some courts, arguing that in view of the remedial character of the Statute a liberal construction is justified, have held that the partnership agreement was contrary to its spirit, if not within its terms.[10] Other courts have regarded the contract as not essentially different from one whereby A agrees to buy land in trust for B and hence within the very letter of the Statute.[11] In cases where the acquisition of land is not involved, however, a contract of partnership is treated, with respect to the purchase and sale of property, as one of mutual agency, whereby each partner empowers the other to act for him within the scope of the common business,[12] and, when it is brought under consideration in connection with the Statute of Frauds, to ascribe to the parties an intent actually to buy in trust would seem a perversion of the terms of their agreement. Indeed, in this view the contract would appear to contemplate not the formation of a trust but merely the creation of an agency for the purchase of realty and as such would not fall within the Statute.[13]

It is true nevertheless that a partner is, in certain circumstances, as where he fraudulently takes title to firm realty in his own name, compelled to hold it in trust, and some courts, arguing that this trust arises *ex contractu,* have refused to allow his associate to establish his interest therein by parol.[14] It is to be observed, however, that the agreement of partnership is fully executed by the formation of the firm[15] and at that time no specific *res* exists which can be considered as the subject matter of the trust.[16] Moreover, once the association is accomplished any cause of action must arise out of the partnership relation.[17] It follows, then, that this trust obligation must spring from

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[7]Burdick, Partnership 15.

[8]Caddick *v.* Skidmore (1857) 2 De G. & J. 52; Robinson Bank *v.* Miller (Ill. 1894) 27 L. R. A. 449; Goldstein *v.* Nathan (1895) 158 Ill. 641.

[9]Burdick, Partnership 106.

[10]Henderson *v.* Hudson (Va. 1810) 1 Munf. 510.

[11]See 13 Harv. L. Rev. 455.

[12]Karrick *v.* Hanaman (1896) 168 U. S. 328, 334.

[13]Garth *v.* Davis (Ky. 1905) 85 S. W. 692; Davenport *v.* Buchanan (1894) 6 S. D. 376; see Murley *v.* Ennis (1874) 2 Colo. 300; Little *v.* McCarter (1883) 89 N. C. 233.

[14]Smith *v.* Burham (1838) 3 Sumn. 435.

[15]Smith *v.* Carlton (N. Y. 1847) 2 Barb. Ch. 336; McKay *v.* Rutherford (1848) 6 Moo. E. C. 413, 429; see Fox *v.* Clifton (1832) 9 Bing. 115, 117.

[16]Murley *v.* Ennis *supra;* see Chester *v.* Dickinson (1873) 54 N. Y. 1; Richards *v.* Grinnell (1884) 63 Ia. 44.

[17]Parsons, Partnership 7, note.

the breach of the fiduciary obligation rather than from the contract itself and being thus created by operation of law is expressly excepted from the terms of the Statute.[18] It would seem, therefore, that the application of the Statue of Frauds in such cases is to be justified only by the adoption of the above mentioned liberal interpretation, a view which, it must be admitted, aproaches judicial legislation.[19] As the general tendency, however, has always been to restrict its application, the recent case of *Hardin* v. *Hardin* (S. D. 1911) 129 N. W. 108, in allowing the plaintiff to prove an oral agreement of partnership for the location of mining property and thus to establish his interest in certain mines which had been acquired by the defendant in fraud of this agreement, would seem to have adopted an interpretation more correct on principle as well as in accord with the decisions in its own and the great majority of jurisdictions.[20]

EFFECT OF THE REPEAL OF A STATUTE UPON PENDING ACTIONS.—It is often broadly stated that after a statute has been repealed without a saving clause it must be considered, except as to transactions which are passed and closed, as though it had never existed.[1] This general rule must be conceived, however, as qualified by the principle that rights which have vested under the statute are not ordinarily interfered with by the repeal.[2] Regarded as a rule of construction for determining whether or not the legislature intended the act to have a purely prospective effect,[3] this limitation is not only beyond criticism, but, in view of the hardship consequent upon the enactment of any retrospective law, is highly to be commended; and in an effort to find this beneficent intent, the courts have even gone so far as to do violence to the language of the repealing act.[4] Many cases, however, contain strong intimations that this rule goes to the power rather than to the intention of the legislature.[5] Unless the term vested rights, as thus used, be confined to rights protected by the State or Federal Constitutions, this position is clearly untenable, for state legislation is restricted only by the limitations contained in those instruments,[6] and in spite of assertions to the contrary,[7] is not subject to judicial annulment simply

[18]Kayser *v.* Maughan (1885) 8 Colo. 232; see Dale *v.* Hamilton (1846) 5 Hare 369; Hodge *v.* Twitchell (1885) 33 Minn. 389.

[19]See Henderson *v.* Hudson *supra.*

[20]See Marsh *v.* Davis (1883) 33 Kan. 326, and Gray *v.* Smith (1889) L. R. 43 Ch. Div. 208, in regard to the sale of an interest in an existing partnership, the assets of which consist in part of realty.

[1]Surtees *v.* Ellison (1829) 9 B. & C. 750.

[2]See Washburn *v.* Franklin (N. Y. 1861) 35 Barb. 599; Curtis *v.* Leavitt (1857) 15 N. Y. 9, 152; C. & L. R. R. Co. *v.* Kenton County Court (Ky. 1851) 12 B. Mon. 144.

[3]See Newsom *v.* Greenwood (1871) 4 Ore. 119; Hitchcock *v.* Way (1837) 6 A. & E. 943. *Cf.* Bates *v.* Stearns (N. Y. 1840) 23 Wend. 482.

[4]Gillmore *v.* Shooter (1678) 2 Mod. 310; Craies, Statute Law (2nd ed.) 352, 353.

[5]See Washburn *v.* Franklin *supra;* C. & L. R. R. Co. *v.* Kenton County Court *supra;* Mitchell *v.* Doggett (1847) 1 Fla. 400.

[6]Cooley, Constitutional Limitations (7th ed.) 239, 240, 241.

[7]See Goshen *v.* Stonington (1822) 4 Conn. 209; Fletcher *v.* Peck (1810) 6 Cranch 87; Danville *v.* Pace (Va. 1874) 25 Gratt. 1.